

CANADA / JUDGMENT

Club Exploria, LLC v. Moore

2021 BCSC 816

COURT

Supreme Court of British Columbia

DECIDED

3 May 2021

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2021 BCSC 816 Club Exploria, LLC v. Moore

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Club Exploria, LLC v. Moore,

2021 BCSC 816

Date: 20210503

Docket: S2010145

Registry: Vancouver

Between:

Club Exploria, LLC

Petitioner

And

George Moore, Prospects DM, Inc. and Joshua Grant

Respondents

Before: The Honourable Madam Justice Lyster

Reasons for Judgment

Counsel for the Petitioner

via teleconference:

C. Elrick

Counsel for the Respondent,

George Moore via teleconference:

N. Kamoosi

Counsel for the Respondents,

Prospects DM, Inc. and Joshua Grant

via teleconference:

C. Hartnett

Place and Date of Hearing:

Vancouver, B.C.

March 26, 2021

Place and Date of Judgment:

Vancouver, B.C.

May 3, 2021

Introduction

- [1] Club Exploria, LLC ("Exploria") obtained a Letter Rogatory from the United States District Court for the Northern District of Illinois (the "Illinois Court"), requesting Joshua Grant and a representative of Prospects DM, Inc. ("Prospects DM Inc.") to testify at a deposition and produce documents in relation to a proposed class action in the United States (the "Illinois Action"). Exploria applies to this Court to have the Letter Rogatory enforced, compelling Prospects DM Inc. and Mr. Grant to be deposed and produce the documents requested.
- [2] By way of background, George Moore is the plaintiff and Exploria is the defendant in the Illinois Action. The Illinois Action is a proposed nationwide class action, in which Mr. Moore alleges that Exploria, which sells vacation packages through various marketing programs, violated the Telephone Consumer Protection Act, 47 U.S.C. § 227 [TCPA]. Mr. Moore alleges Exploria did so by hiring multiple vendors to place pre-recorded calls on its behalf as part of a telemarketing campaign to sell vacation packages in Florida. Mr. Moore alleges he received two phone calls as part of this campaign, despite the fact his name was on a do-not-call registry and he did not consent to receive such calls, in violation of the TCPA.
- [3] Exploria denies Mr. Moore's allegations in the Illinois Action. Among its defences is that it is not vicariously liable for calls made by vendors. Prospects DM Inc. was a sub-contractor that participated in the telemarketing campaign, and Mr. Grant is the president of Prospects DM Inc. Prospects DM Inc. is a federally incorporated Canadian corporation, with a registered office in Toronto, Ontario, extraprovincially registered in British Columbia. Mr. Grant lives in British Columbia. There was no direct business relationship between Exploria and Prospects DM Inc., and neither Prospects DM Inc. nor Mr. Grant are parties to the Illinois

Action. Exploria seeks to depose Mr. Grant, in both his personal capacity and as a representative of Prospects DM Inc., in order to obtain evidence relevant to the Illinois Action, including documents and information relating to calls made by Prospects DM Inc. as part of the telemarketing campaign.

- [4] Mr. Moore supports Exploria's application, which is opposed by both Prospects DM Inc. and Mr. Grant. There is no real dispute that the evidence in question would be relevant to the Illinois Action. The chief disputes have to do with whether the evidence could be obtained from alternative sources, and whether the deposition and production of documents required under the Letter Rogatory would be unduly burdensome to Prospects DM Inc. and Mr. Grant.
- [5] For the reasons that follow, I have concluded that the Letter Rogatory ought to be enforced, on the terms and conditions I describe below.

The Letter Rogatory

- [6] Exploria applied for and obtained the Letter Rogatory from the Illinois Court on September 1, 2020. The Letter Rogatory asks for the assistance of this Court to compel the attendance of a representative of Prospects DM Inc. and Mr. Grant at depositions to be conducted in this province. The matters about which they would be examined are listed in schedules to the Letter Rogatory, as are the documents they would be required to produce. The depositions would be transcribed, and the testimony and documents produced are intended for the trial or preparation for the trial of the Illinois Action. The Illinois Court is satisfied that the testimony and documents would be relevant to the claims and defences in that case.
- [7] The Illinois Court goes on to state that it is satisfied that the evidence sought is directly relevant, material and necessary, and cannot reasonably be obtained by other methods. The Illinois Court explains at some length how, in its view, Prospects DM Inc. and Mr. Grant were involved in the telemarketing campaign, and thus why their evidence would be material and necessary, as follows:

b. Prospects and Joshua Grant

Prospects, after subcontracting with Acquis, provided lead generation services for the call campaign relating to Club Exploria through a Club Exploria inbound transfer call program in exchange for a fee, which was calculated based on the number of calls that resulted in a live transfer for qualifying customers. Prospects calls the opted-in telephone number to inquire about interest in a particular company associated with the lead, in this case Club Exploria.

Although Prospects has a United States affiliate entity - Prospects DM, LLC ("Prospects LLC") - the evidence sought from Prospects is not obtainable from Prospects LLC. To start, in response to a subpoena from Plaintiff, third-party subpoena respondent Fextel, Inc. (another lead generation company involved in the call campaign at issue) produced information establishing that one of the numbers Prospects used to call Plaintiff as part of the campaign at issue was owned by a

Canadian affiliate of Prospects, CSECAN d/b/a Crown Management Systems in Ontario, Canada, for whom Mr. Grant (at his Prospects email account) is the contact. See Fextel, Inc. Letter attached as Exhibit G to the Motion for Issuance. In addition, Mr. Grant himself communicated directly with Dan Connolly, the sole member and employee of Acquis (the lead generator that subcontracted Prospects to make TCPA-compliant calls for the call campaign at issue) about the campaign, including about the script and voice used for the campaign and changes to the transfer call number. See, e.g., emails attached as Exhibit H to the Motion for Issuance. Because Mr. Grant and Prospects reside in British Columbia, the additional relevant communications and documents sought by Club Exploria likely do as well or are otherwise within their power or control.

Additionally, on multiple occasions, Prospects' counsel has informed counsel for Club Exploria that Prospects obtained the consent data for Plaintiff's telephone number from a company called Landfall Data ("Landfall"). Decl. of Michael Grill attached as Exhibit E to the Motion for Issuance at ¶ 7. Club Exploria's subpoenas - including one to Landfall - have not led to the production of any additional documents in this matter. In fact, Landfall informed counsel for Club Exploria that Landfall never worked with Prospects of Mr. Grant. Id. Prospects' counsel thereafter stated that Landfall may have provided Plaintiff's lead to a Prospects' affiliate of Prospects owned one of the numbers at issue in the call campaign, requires Club Exploria to ensure that it will obtain all relevant information about the lead and calls made on its behalf, whether that information exists in the United States or in Canada. Therefore, to the extent that Mr. Grant, Prospects, and their Canadian affiliates have information regarding leads generated and calls made during the relevant calling campaign, including with respect to Plaintiff's telephone number, Mr. Grant and Prospects should be required to produce documents and testimony related thereto.

[8] The Illinois Court was satisfied that it is in the interests of justice for Prospects DM Inc. and Mr. Grant to be examined and to produce the documents sought. It notes that it has issued an Agreed Confidentiality Order which would extend to the testimony and evidence produced by Prospects DM Inc. and Mr. Grant. The Illinois Court requests this Court to compel Prospects DM Inc. and Mr. Grant to produce the documents sought at least 21 days prior to their depositions, and to compel them to testify under oath. The Illinois Court requests that the examinations be conducted pursuant to the discovery rules provided in the Federal Rules of Procedure of the United States, "except to the extent that such procedure is incompatible with the laws of British Columbia". It further refers to certain privileges available to witnesses under the laws of the United States, in particular solicitor client privilege and privilege against criminal self-incrimination. Finally, the Illinois Court states that fees and costs incurred in the execution of the Letter Rogatory that are reimbursable will be paid by Exploria.

Analysis

[9] This Court's authority to enforce letters rogatory from foreign courts is found in s. 53 of the Evidence Act, R.S.B.C 1996, c. 124. It provides:

Power to order examination of witness under commission issued by foreign court

53 (1) If, on application, it is made to appear to the Supreme Court that a court or tribunal of competent jurisdiction in a foreign country has, by commission, order or other process, duly authorized obtaining the testimony of a witness outside of its jurisdiction but within the jurisdiction of the Supreme Court and the testimony relates to an action, suit or proceeding pending in or before the foreign court or tribunal, the Supreme Court may

- (a) order the examination of the witness before the person appointed, and in a manner and form directed by the commission, order or other process,
- (b) by the same order or a subsequent order, command either or both of the following:
 - (i) the attendance of the named witness for the purpose of being examined;
 - (ii) the production of any writing or other documents mentioned in the order, and
- (c) give directions regarding
 - (i) the time, place and manner of the examination, and
 - (ii) all other matters connected with the examination that appear reasonable and just.
- (2) An order made by the Supreme Court under subsection (1) may be enforced, and any disobedience of it punished, in the same manner as an order made by the Supreme Court in a cause pending in the Supreme Court.
- (3) A person whose attendance is ordered under this section is entitled to the same conduct money and payment for expenses and loss of time as on attendance at a trial in the Supreme Court.
- (4) A person examined under the commission, order or other process referred to in subsection (1)
 - (a) has the same right to refuse to answer any questions that the witness would be entitled to refuse to answer in a cause pending in the Supreme Court, and
 - (b) is not compelled to produce at the examination any writing or document that the person would not be compellable to produce at the trial of the cause referred to in paragraph (a).
- (5) If the commission directs, or the instructions of the court accompanying it direct, that the person to be examined must be sworn or must affirm before the commissioner or other person, the commissioner or other person has authority to administer an oath or affirmation to the person to be examined.

[10] *Monster Energy Company v. Craig*, 2016 BCCA 290 [Energy], is the leading authority in this province with respect to the enforcement of letters rogatory. It provides at para. 11 that "the starting point is the presumption that the request from the foreign court will be granted unless it would be contrary to Canadian public policy to do so or would otherwise be

prejudicial to Canadian sovereignty or to Canadian citizens". The court in *Energy* referred at para. 13 to the decision of Madam Justice L. Smith in *EchoStar Satellite Corporation v. Quinn*, 2007 BCSC 1225 [*EchoStar*], for the following list of factors to be considered in determining whether to give effect to letters rogatory:

1. Relevance;
2. Whether the evidence is necessary for trial and will be adduced at trial if admissible;
3. Whether the evidence is otherwise obtainable;
4. Whether the order sought is contrary to public policy;
5. Whether the documents sought are identified with reasonable specificity; and
6. Whether the order sought is unduly burdensome having in mind what the witness would be required to do and produce were the action to be tried locally.

[11] I now turn to a consideration of each of those factors.

Relevance

[12] In considering relevance, it is not for this Court to decide if the Illinois Court was wrong in concluding the evidence sought is relevant: *B.I. Incorporated v. Au*, 2017 BCSC 2476 at para. 17 [B.I.]. The Court's proper role is to be satisfied that there is some probative value to the evidence: at para. 19. There is no real dispute that the evidence sought from Prospects DM Inc. and Mr. Grant is relevant to the Illinois Action. Documents and information relating to calls placed in the relevant time period, information Prospects DM Inc. obtained in connection with those calls, and consent data related to the phone numbers Prospects DM Inc. called is all clearly relevant. I am satisfied that the factor of relevance is met.

Is the evidence necessary?

[13] There is also little dispute about this question. Exploria says, and I accept, that the evidence sought is necessary for it to make full answer and defence in the Illinois Action. The fact that the evidence is, at this stage, for discovery purposes, is not an impediment to the Letter Rogatory being enforced: *Maverick LNG Holdings Ltd. v. Teekay Shipping (Canada) Ltd.*, 2009 BCSC 1538 at paras. 28-29.

Is the evidence otherwise obtainable?

[14] The parties join issue on the question of whether the evidence is otherwise obtainable. Exploria relies on an email sent from Eric Allen, one of the lawyers representing Prospects DM, LLC, in the United States, to Anthony Paronich, one of the lawyers representing Mr. Moore in the United States, dated September 16, 2019. Prospects DM, LLC ("Prospects DM LLC") is an American company related to Prospects DM Inc. Mr. Grant is an officer and director of both companies.

[15] In his email, Mr. Allen stated that Prospects DM LLC objected to a subpoena sought by Mr. Moore in the United States seeking the same evidence now sought through the Letter Rogatory. Mr. Allen wrote:

Prospects objects to the subpoena on the following grounds:

1. The subpoena is directed at a business which does not have possession, custody or control of many of the requested items. The subpoena was served on Prospects DM, an Ohio entity, which is not in possession of complete call logs, communications and other responsive documents, which would be in the possession of Prospects' affiliates in Canada and/or Romania. Notwithstanding the above, Prospects has and is making reasonable efforts to obtain the requested documents from the same. To the extent applicable, Prospects reserves the right to require Plaintiff to obtain the same only through a valid Canadian or Romanian subpoena .
- [16] In submissions before this Court, Prospects DM Inc. says that the relevant sub-contract was entered into by Prospects DM LLC, the American company, that it was Prospects DM LLC that was involved in the calling campaign, and that the documents and information sought are in the possession and control of Prospects DM LLC, not Prospects DM Inc. Prospects DM Inc. and Mr. Grant say that to the extent the documents sought from Prospects DM Inc. and Mr. Grant are in the possession and control of either of them, they have already been provided to Exploria. They also submit that this application is premature, as there is an outstanding offer on its part to have another representative of Prospects DM LLC deposed in the United States, and an outstanding motion to enforce a subpoena against Prospects DM LLC seeking the same documents.
- [17] Exploria and Mr. Moore submit that they are "being given the run around", with Prospects DM LLC having originally taken the position the documents were in the possession of Prospects DM Inc. in Canada (or Romania), and Prospects DM Inc. now saying that the documents cannot be obtained from Prospects DM Inc. in Canada.
- [18] I would observe that the distinction between the two companies is less than clear in some of the evidence before the Court, and that there has been confusion in some of the communications about which Prospects entity was being referred to. That confusion has extended even to counsel involved in this matter, as shown in a December 11, 2020 letter from counsel for Prospects DM Inc. to counsel for Exploria and Mr. Moore. I mention this not to criticize counsel, but as an example of the lack of clarity about the two Prospects entities, which has complicated this matter.
- [19] The Illinois Court was alive to the fact there are two different Prospects related entities. In the passage from the Letter Rogatory quoted above, the Illinois Court referred to the two companies, and stated its conclusion that the evidence was not obtainable from Prospects DM LLC. It referred to the fact one of the phone numbers Prospects DM LLC used to call Mr. Moore was owned by a Canadian affiliate of Prospects, for which Mr. Grant, at his Prospects email, was the contact. It also referred to the fact Mr. Grant communicated with Acquis, the

lead generator Exploria contracted with and that sub-contracted with Prospects DM LLC, about the campaign. The Illinois Court concluded that because Mr. Grant and Prospects DM Inc. reside in British Columbia, the additional documents sought by Exploria likely do as well, or are otherwise within their possession or control.

- [20] The evidence before this Court establishes that Exploria has attempted to secure the production of the documents sought and the voluntary appearance of Mr. Grant for a deposition in British Columbia, but has been unsuccessful in doing so. Mr. Grant and Prospects DM Inc. have not been prepared to agree to same in the absence of a Letter Rogatory and order from a Canadian court. Mr. Moore filed a motion to compel production of documents in the Illinois Court on March 21, 2021, but that motion had not been heard as of the date of the hearing of this matter.
- [21] I am satisfied that the circumstances canvassed by the Illinois Court and in the evidence before me establish that the documents and information sought from Prospects DM Inc. and Mr. Grant are likely not obtainable from other sources, including from Prospects DM LCC. It is not premature for Exploria to be seeking, at this point, to enforce the Letter Rogatory.
- [22] Prospects DM Inc. and Mr. Grant did not provide any explanation of the September 16, 2019 email from Mr. Allen telling counsel for Mr. Moore the documents were not in the United States and were in Canada or Romania. It is difficult to escape the conclusion that Prospects DM Inc. has indeed been giving Exploria and Mr. Moore "the run around".
- [23] Mr. Grant swears in his affidavit that Prospects DM Inc. does not have documents related to the campaign, and that any documents it had related to the telephone number have been produced. Exploria says in response that there is no evidence about how records have been searched for. Even if the documents were obtainable elsewhere, I would find, as in B. I., at paras. 22-24, that the evidence sought from Prospects DM Inc. and Mr. Grant "is evidence of some value that cannot be otherwise obtained." Given the mixed messages Exploria and Mr. Moore have received from Prospects DM Inc. and Prospects DM LLC, they are entitled to depose Mr. Grant, in both his personal capacity and as a representative of both companies, to determine what documents and information they have that is relevant to the Illinois Action.
- [24] Prospects DM Inc. further submits in this connection that it is not necessary for Mr. Grant to be deposed, as his only involvement in this matter is as a representative of Prospects DM LLC, and Roger Castro, Vice-President of Prospects DM LLC, whom it says is an equally qualified representative of Prospects DM LLC, has been made available for deposition in the United States. Exploria says in response to this submission that Prospects DM Inc. and Mr. Grant acknowledge that Mr. Grant would be a qualified representative, and have failed to establish that Mr. Castro would in fact be qualified.

[25] I agree with Exploria that Mr. Grant is the appropriate representative to be deposed on behalf of Prospects DM Inc. Mr. Grant is the President of Prospects DM Inc., and the person involved in the communications canvassed above, not Mr. Castro. The materials before me do not allow me to conclude that Mr. Castro would be an equally qualified representative of Prospects DM Inc.

Are the documents sought with reasonable specificity?

[26] The documents sought are listed with reasonable specificity in the schedules to the Letter Rogatory.

Is the order sought contrary to public policy or unduly burdensome?

[27] It is convenient to deal with the factors of whether the order sought is contrary to public policy or unduly burdensome to Prospects DM Inc. and Mr. Grant together, as they combine their submissions on these points. They recognize that there is a confidentiality order in place from the Illinois Court that on its face would appear to protect their privacy interests, but raise the concern that documents that were redacted on the basis of confidentiality in the motion for the Letter Rogatory were appended to an affidavit filed in these proceedings in unredacted form. They argue that the Agreed Confidentiality Order therefore does not sufficiently protect their interests, rendering the order sought both contrary to public policy and unduly burdensome.

[28] Prospects DM Inc. and Mr. Grant also raise various concerns about the terms under which the depositions would be carried out, which I will address here. They submit that Exploria should be limited to a direct examination of Mr. Grant involving only non-leading questions, should be limited to matters related to Prospects DM Inc. and not Prospects DM LLC, should be subject to confidentiality terms similar to those ordered in EchoStar, and subject to the Agreed Confidentiality Order issued by the Illinois Court. They also submit that, before any deposition takes place, Exploria should be required to pay \$5,000 in trust as an advance against their expenses for participation in the depositions.

[29] In B.I., the court stated at para. 27, that in considering whether a deposition would be unduly burdensome, "the task before this Court is to address the notion of comity, not to engage in a comparative analysis of the rules that apply to the New York proceeding in the context of our Rules of Court". I have followed that principle in determining the appropriate orders.

[30] I am of the view that the privacy and other legitimate interests of Prospects DM Inc. and Mr. Grant can be appropriately protected through the orders I set out below, which incorporate, with such changes as I have deemed appropriate in this case, the substance of many of the orders made in EchoStar. With those protection orders in place, enforcement of the Letter Rogatory will be neither contrary to the public interest nor unduly burdensome.

- [31] In this regard, I do not agree with Prospects DM Inc. and Mr. Grant that Expedia should be limited to only non-leading questions. The depositions have been ordered under the United States Federal Rules of Civil Procedure, and are subject to the restrictions set out in the British Columbia Evidence Act and the Canadian Evidence Act, R.S.C. 1985, c. C-5. Counsel will be free to ask Mr. Grant any questions related to the topics listed in Schedules B and D to the Letter Rogatory, and will not be limited to doing so in the form of non-leading questions.
- [32] Nor do I agree with Prospects DM Inc. and Mr. Grant that questions should be limited to matters related to Prospects DM Inc. Given that lack of clarity around the respective roles of the two Prospects entities, and Mr. Grant's role in both, Expedia will be permitted to ask Mr. Grant questions related to both Prospects DM Inc. and Prospects DM LLC, so far as they are relevant to the Illinois Action.

Orders

[33] I therefore order as follows:

1. The Respondent, Joshua Grant, be examined by deposition in British Columbia pursuant to a letter rogatory (the "Letter Rogatory") issued on September 1, 2020 by the United States District Court for the Northern District of Illinois (the "Illinois Court"), in the Case No. 1:19-cv-02504 under the style of proceeding George Moore on behalf of himself and others similarly situated v. Club Exploria, LLC (the "Illinois Action"). A copy of the Letter Rogatory is attached as Schedule "A".
2. Joshua Grant, as representative of the Respondent, Prospects DM, Inc. ("Prospects DM Inc."), be examined by deposition in British Columbia pursuant to the Letter Rogatory.
3. Joshua Grant attend for examination by deposition at the offices of Fasken Martineau DuMoulin, LLP, 2900 - 550 Burrard Street, Vancouver, BC within 30 days from the hour of 10:00 a.m. to 5:00 p.m., or at such other dates, places and times as the parties may agree (the "Deposition").
4. Joshua Grant and Prospects DM Inc. shall produce 21 days before the Deposition, or at such other time as the parties may agree, the documents identified at Schedule C of the Letter Rogatory.
5. Counsel for the Petitioner and the Respondents, who may be members of the bars of the States of United States of America, are permitted to depose Mr. Grant in both his own capacity and as representative of Prospect DM Inc., at the Deposition.
6. The Deposition is to be conducted in accordance with the United States Federal Rules of Civil Procedure, except to the extent that such rules are incompatible with the laws of British Columbia.

7. The Deposition shall be conducted by videoconference and the testimony of Joshua Grant shall be given under oath or affirmation and recorded by verbatim transcript by a professional court reporter.
 8. The Petitioner shall deliver an original copy of the transcripts of the Deposition to the Illinois Court.
 9. The parties are prohibited from disclosing any documents obtained under this Order to any party outside of the Illinois Action. The parties are prohibited from disclosing the transcript or videotape of the Deposition or information obtained as a result of the testimony or documents to any party outside of the Illinois Action, except that a party to the Illinois Action will be entitled to disclose the transcript and any documents to experts or advisors retained by it in connection with the Illinois Action, on condition that those experts or advisors agree to be bound by the same confidentiality provisions. This confidentiality order also applies to counsel for the parties and to the court reporter and any others involved in the taking of the evidence, production, or copying of transcripts and videotapes.
 10. Any video, audio, or written transcript of evidence must include a statement to this effect, "This (video/audiotape/transcript) is confidential and may only be used for the purposes of the Illinois Action."
 11. The evidence is to be used only in the Illinois Action and not for any other purpose.
 12. The evidence given and documents produced will be deemed to be compelled and subject to the protections of compelled testimony contained in the Canada Evidence Act, the B.C. Evidence Act, and the Charter. In particular, no document produced, no testimony given, and no evidence derived from any such evidence shall be used in subsequent proceedings against the party who produced the document or gave the testimony, except as proof of a prior inconsistent statement or in a prosecution for perjury.
 13. The Respondents will be entitled to retain counsel and to recover their costs from the Petitioner pursuant to the British Columbia Rules of Court, as well as reasonable fees and expenses for their own preparation. The Petitioner will pay as an advance against those costs and fees \$2,500 in trust to counsel for each of the Respondents prior to the Deposition taking place.
- [34] Counsel are directed to ensure that a copy of the Letter Rogatory with Schedules are attached to the order.

"Madam Justice L. Lyster"

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